

EXHIBIT 604

PLAINTIFFS' EXHIBITS 010626

AMY R. McMASTER, M.D.

August 5, 2011

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IN THE UNITED STATES DISTRICT COURT OF THE
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

KATHY MCCORNACK, et al.,)
)
Plaintiffs,)
)
v.) CASE NO.
) 2:09-CV-0671
ACTAVIS TOTOWA, LLC, et al,)
)
Defendants.)
)

VIDEOCONFERENCE AND TELEPHONIC

DEPOSITION OF:

AMY R. McMASTER, M.D.

Taken on Behalf of the Plaintiffs

August 4, 2011

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19		** [sic] Exactly as Stated	
20		** (phonetic) As the Word Sounded	

25 ~*~

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1 The Videoconference and Telephonic
2 Deposition of AMY R. McMASTER, M.D., taken on behalf
3 of Plaintiffs on the 5th day of August, 2011,
4 commencing at 10:00 a.m. in the offices of Vowell and
5 Jennings, 214 Second Avenue, North, Nashville,
6 Tennessee, for all purposes under the Federal Rules of
7 Civil Procedure.

8 The formalities as to notice, caption,
9 certificate, et cetera, are waived. All objections,
10 except as to the form of the questions, are reserved
11 to the hearing.

12 It is agreed that Deborah M. Fernau,
13 being a Notary Public and licensed Court Reporter for
14 the State of Tennessee, may swear the witness, and
15 that the reading and signing of the completed
16 deposition by the witness are reserved.

17

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* * *

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23

AMY R. McMASTER, M.D.,

24

was called as a witness, and after having been

25

first duly sworn, testified as follows:

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1 DIRECT EXAMINATION

2 BY MR. ERNST:

3 Q. Good morning, Doctor, how are you this
4 morning?

5 A. Good morning, I'm fine. How are you?

6 Q. Would you state your full name and address for
7 the record, please.

8 A. My name is Dr. Amy R. McMaster,
9 M-C-M-A-S-T-E-R. Would you like my home address or
10 business address?

11 Q. Your business address, please.

12 A. 850 R.S. Gass, G-A-S-S, Boulevard, Nashville,
13 Tennessee 37216.

14 Q. And are you currently employed?

15 A. I am.

16 Q. By whom?

17 A. Forensic Medical Management Services.

18 Q. And what do you do for Forensic Medical
19 Management Services?

20 A. I'm the chief medical officer.

21 Q. What does Forensic Medical Services [sic] do?

22 A. We are a private company who contracts our
23 services throughout Tennessee and other states to
24 provide forensic pathology and death investigation
25 services.

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1 Q. And do you have specific contracts with
2 counties or states to perform autopsies?
3 A. We have a specific contract with Davidson
4 County, which is Nashville, and Shelby County in
5 Memphis. We also provide services to other counties
6 throughout Tennessee, but we don't have specific
7 contracts with them, it's done on a case-by-case
8 basis.

9 Q. And you are called upon, on a case-by-case
10 basis, under what circumstances?

11 A. Well, it depends. As a medical examiner or
12 forensic pathology, to be consulted on a medical
13 examiner case, we investigate people who die under
14 suspicious, unnatural, or unusual circumstances.

15 Q. So are you hired generally by the counties to
16 prosecute criminal cases or assist in the
17 determination of the cause of death for prosecution of
18 criminal cases?

19 A. We do not prosecute anyone. I'm a physician
20 who gives my medical opinion about cause of death and
21 manner of death.

22 Q. Have you testified in court before?

23 A. Yes.

24 Q. On how many occasions?

25 A. Many. I don't keep a case list, so I can't

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1 give you an exact number, but I testify in criminal
2 court frequently.

3 Q. Have you ever testified in a civil case?

4 A. I have.

5 Q. On how many occasions?

6 A. In civil testimony, the cases I've been
7 involved in, I've only testified in court once.

8 Q. Okay. In the criminal field, can you give me
9 an estimate or a ballpark number as to the number of
10 times you've testified in criminal cases?

11 A. No, I can't. I can semi-quantitate it as
12 frequent. But as I previously testified to, I don't
13 keep a case list, so I can't give you an exact number.

14 Q. I'm not asking for an exact number. I mean,
15 is it over 500, over 100, over 50? I just need a
16 ballpark.

17 A. It's probably less than 500, more than 100.

18 Q. So somewhere between 100 and 500 cases you've
19 testified in a criminal setting in a courtroom?

20 A. I think that would be a rough estimate, yes.

21 Q. And were these criminal prosecutions, as a
22 general rule, that you testified in?

23 A. I am generally called as a witness by the
24 prosecution; rarely, I am called by the defense. But
25 I do not consider myself a prosecution or defense

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1 expert or witness, I'm just responding to subpoenas.

2 Q. Okay. However, you do have contracts with
3 counties that have district attorney's offices; true?

4 A. Yes. The county has a district attorney's
5 office, but we do not work for the district attorney.

6 Q. You work for the county?

7 A. No, I work for --

8 Q. I mean, do you have a contract with the
9 county?

10 A. Correct.

11 Q. Now, in the times that you do testify, this
12 100 to 500 times, I take it that you would be
13 testifying on the cause of death, as a general rule;
14 is that true?

15 A. I generally testify to cause of death, manner
16 of death, injuries that relate to the cause of death,
17 and, also, any other natural disease that may be
18 present.

19 Q. Have you ever testified in any poisoning
20 cases?

21 A. I have.

22 Q. And have you reached a conclusion that someone
23 died of poison before?

24 A. I don't use the term "poisoning." That is not
25 a cause of death.

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1 Q. Well, what do you use as a term, Doctor?

2 A. Well, it depends on what the cause of death is
3 and what agent played a role in their death.

4 Q. If an excessive drug intake was used, what is
5 the terminology that you use when you testify?

6 A. It could be, sometimes, acute drug toxicity,
7 acute drug overdose, acute combined drug toxicity, or
8 some variation thereof.

9 Q. How do you conclude that a person died of
10 acute drug toxicity?

11 A. During the process of a complete death
12 investigation, which will include review of the
13 medical history; review of the circumstances of their
14 death, including the scene; review of autopsy findings
15 if they are available; and interpretation of
16 toxicology.

17 Q. Is it true that in the 100 to 500 cases that
18 you've testified in, do you have a -- strike that.

19 Do you have an estimate as to the number of
20 cases for drug toxicity that you've testified in
21 that's caused a death?

22 A. I do not have a number; however, it is a very
23 common part of my practice to make the diagnosis or
24 exclude the diagnosis of acute drug toxicity.

25 Q. In the 100 to 500 times that you have

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1 testified in a courtroom, how many of those is -- a
2 rough estimate, were results -- resulted in death from
3 drug toxicity?

4 A. A minority.

5 Q. 50 to 100? 100 to 200?

6 A. No, far less than that.

7 Q. How many?

8 A. I don't have an exact number, but it's -- I
9 would consider it -- the vast minority of cases that I
10 testify about in criminal court are about drug
11 toxicity cases.

12 Q. You have concluded that people died of drug
13 toxicity; true?

14 A. Yes.

15 Q. And you have used postmortem blood tests as a
16 factor in that opinion; isn't that true?

17 A. Yes.

18 Q. Now, have you ever testified before about
19 death due to digoxin?

20 A. No, I have not.

21 Q. So this is the first time that you have ever
22 testified with regard to a death by -- relating to
23 digoxin toxicity; is that true?

24 A. Correct.

25 Q. Now, in the times that you have rendered

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1 opinions in criminal cases, you -- did you extrapolate
2 what the blood level was in order to determine
3 toxicity as a cause of death?

4 MR. MORIARTY: Objection; form.

5 Go ahead.

6 THE WITNESS: What do you mean by
7 "extrapolate"?

8 BY MR. ERNST:

9 Q. In other words, you had a postmortem blood
10 sample that showed a particular drug; true?

11 A. Yes.

12 Q. Generally. And you concluded that there was a
13 toxic level and the person died from the ingestion of
14 the drug; true?

15 A. Yes.

16 Q. And you were able to testify that the person
17 died from an excessive amount of that drug; true?

18 A. Yes.

19 Q. And you did that because you extrapolated from
20 the postmortem blood that was taken from an
21 individual; true?

22 MR. MORIARTY: Objection.

23 MS. AHERN: Objection.

24 MR. MORIARTY: Go ahead.

25 THE WITNESS: No, I do not use the term

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1 "extrapolation." That's not part of my practice.

2 BY MR. ERNST:

3 Q. Well, you concluded that they died of toxicity
4 in some way based upon a blood test taken postmortem;
5 true?

6 A. Yes.

7 Q. Now, what is your understanding of the burden
8 of proof in a criminal case?

9 A. That's really outside of my area of expertise.
10 I'm here to testify about cause of death and manner of
11 death.

12 Q. Well, in your own mind, when you testify as to
13 cause of death and manner of death, is it beyond a
14 reasonable doubt, in your own mind, before you
15 testify?

16 MR. MORIARTY: Objection.

17 Go ahead.

18 THE WITNESS: No, sir, cause of death is
19 a medical opinion that means more likely than not, in
20 my practice.

21 BY MR. ERNST:

22 Q. Okay. You have furnished us with a CV in this
23 case. Do you have it in front of you, Doctor, your
24 CV?

25 A. I do not. And I don't believe I furnished it

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1 to you. I assume someone else did.

2 MR. ERNST: Mr. Moriarty, do you have a
3 copy of her CV there, please?

4 MR. MORIARTY: Yes, I do.

5 MR. ERNST: Would you hand it to her?

6 MR. MORIARTY: Yes, sir.

7 BY MR. ERNST:

8 Q. Doctor, is this a true and accurate copy of
9 your CV?

10 A. The copy that I was just handed does appear to
11 be an accurate copy.

12 MR. MORIARTY: All right. I'd like that
13 marked as Exhibit 1.

14 (Marked Exhibit No. 1.)

15 BY MR. ERNST:

16 Q. And is everything in Exhibit 1, your CV, true
17 and accurate, as far as you know?

18 A. Yes.

19 Q. All right. Now, did you receive a Notice of
20 Deposition for today, Friday, August 5th?

21 A. I did.

22 MR. ERNST: We'd like that marked as
23 Exhibit 2.

24 (Discussion off the record.)

25 (Marked Exhibit No. 2.)

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1 BY MR. ERNST:

2 Q. Would you look at the deposition notice,

3 Dr. McMaster?

4 A. (Complies.) Okay.

5 Q. Does it appear to be -- is that the depo
6 notice that you've seen before?

7 A. Yes.

8 Q. Did you bring all of those -- did you bring
9 your complete file with you today?

10 A. I brought the complete file, yes.

11 Q. Does your file have in it letters from
12 Mr. Moriarty in which your retention to testify was
13 discussed?

14 A. Yes.

15 Q. Can you pull those letters out for me?

16 MR. MORIARTY: There's one, and over
17 objection, I'll give it to the court reporter.

18 MR. ERNST: I would like that letter
19 marked as Exhibit 3.

20 (Marked Exhibit No. 3.)

21 BY MR. ERNST:

22 Q. And, Doctor, without looking at Exhibit 3, can
23 you tell me what your understanding is of why you were
24 hired in this case?

25 A. I was hired to provide an opinion for the

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1 cause of death and manner of death of Mr. McCornack.

2 Q. When were you hired?

3 A. November of 2009.

4 Q. And on what terms were you hired?

5 A. I don't understand your question.

6 Q. How much are you being paid?

7 A. I'm being paid \$500 an hour.

8 Q. And have you submitted a bill, to date, for
9 the time you have spent on this case?

10 A. I have submitted a bill; however, it's not to
11 date.

12 Q. How much was the bill that you submitted?

13 A. \$1,250.

14 Q. And when did you submit that bill?

15 A. December 17th, 2009.

16 Q. And since December 17th, 2009, have you done
17 additional work in this case?

18 A. Yes.

19 Q. Can you quantify the number of hours you have
20 worked on this case for us, please?

21 A. I don't have a total of the number of hours.

22 Q. Can you give me your estimate, please?

23 A. Prior to today, I would estimate it's
24 approximately ten hours or so.

25 Q. Does that include your previous billing of

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1 \$1,200?

2 A. No.

3 Q. Now, you have prepared a report in this case;
4 true?

5 A. Yes.

6 Q. And it is a three-page report?

7 A. Yes.

8 Q. And was this report prepared by you?

9 A. Yes.

10 MR. ERNST: I would like that report
11 marked as Exhibit 4 to this deposition.

12 (Marked Exhibit No. 4.)

13 BY MR. ERNST:

14 Q. Before you wrote this report, did you discuss
15 your findings or discuss what was going to be in the
16 report with Mr. Moriarty?

17 MR. MORIARTY: Objection.

18 You can answer that.

19 THE WITNESS: Yes.

20 BY MR. ERNST:

21 Q. Did Mr. Moriarty suggest any changes that you
22 should include in your report?

23 MR. MORIARTY: Objection.

24 You can answer that, too.

25 THE WITNESS: Not to my knowledge.

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1 BY MR. ERNST:

2 Q. Does your May 17th, 2011 report -- and that is
3 the date of Exhibit 4; true?

4 A. Yes.

5 Q. Does May 17th, 2011, contain the opinions and
6 conclusions that you intend to offer at the time of
7 trial?

8 A. Yes.

9 Q. Now, one of the reasons I want to take this
10 deposition is that I want to make sure there are no
11 surprises that are out there, and that you aren't
12 going to render any other opinions that are not
13 contained in this written document. And it's your
14 testimony that this written document contains the
15 substance of the opinions you intend to offer at the
16 time of trial; true?

17 A. Yes.

18 Q. Now, circling back, if I were to ask you to
19 give us a number of the cases that you have testified
20 about death in courtrooms relating to drug toxicity,
21 would it be more than 25 times?

22 MR. MORIARTY: Objection; asked and
23 answered.

24 Go ahead.

25 THE WITNESS: Probably less than 25, yes.

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1 BY MR. ERNST:

2 Q. Would it be more than 15 times?

3 A. Again, at this point, without keeping a list,
4 it would be difficult for me to quantify it more than
5 that. I would characterize it, however, that in my
6 court testimony, drug-related cases are a vast
7 minority of my case.

8 Q. When you say "vast minority" of the number of
9 times that you have testified, do you believe it's
10 probably somewhere between 15 and 25 times?

11 A. I think I've been --

12 Q. Is that an accurate statement?

13 A. I think I've been clear that I can't quantify
14 it any further than I already have.

15 Q. But you haven't given me any estimate of
16 numbers, just a minority. So can you give me the
17 number of times, within a range, that you think you've
18 testified with regard to drug toxicity as a cause of
19 death?

20 MR. MORIARTY: Objection; asked and
21 answered.

22 Go ahead.

23 THE WITNESS: I believe I've already
24 given you the best estimate, that it's somewhere
25 probably less than 25.

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1 BY MR. ERNST:

2 Q. Okay. Would it be accurate to say that when
3 you say less than 25, does that mean 1, does that mean
4 10, does that mean 15? So it could be an estimate of
5 15 to 25 is my point; is that an accurate statement?

6 A. I think I've been clear that I can't further
7 quantify any more than I already have.

8 Q. So it's someplace between 1 and 25 times; is
9 that accurate?

10 A. Yes, sir.

11 Q. And for each of those 1 to 25 times that
12 you've testified in a court of law, to your knowledge,
13 was it in criminal cases?

14 A. Except for one civil case, yes.

15 Q. And what was the civil case?

16 A. The civil case was involving a woman who died
17 in the state of Alabama, and I was asked to provide an
18 opinion as to the cause of death and manner of death.
19 Her cause of death was initially called an acute
20 combined drug overdose, and it was my testimony that
21 she died of natural disease.

22 Q. And were you hired by any person to render
23 that opinion?

24 A. I was.

25 Q. And by whom were you hired?

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1 A. The attorney's name is Mike Florie,
2 F-L-O-R-I-E. I don't remember the name of the law
3 firm.

4 Q. Do you remember who Mike Florie was
5 representing?

6 A. The defendant, the physician defendant.

7 Q. It was a medical negligence case?

8 A. A medical malpractice case.

9 Q. Have you ever worked with Mr. Moriarty's firm
10 before?

11 A. No, I have not.

12 Q. Have you ever worked with Shook, Hardy & Bacon
13 before?

14 A. No, I have not.

15 Q. Do you have an understanding of how you were
16 contacted by Mr. Moriarty, and why?

17 A. I was contacted by letter. There may have
18 been a phone call, as well, but I don't recall. It's
19 been several years ago.

20 Q. Did you keep notes of the phone call?

21 A. No.

22 Q. Did Mr. Moriarty tell you about this case on
23 the phone?

24 A. Again, I don't independently recall the
25 content of that conversation at this time.

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1 Q. When you agreed to testify in this case, did
2 you do so in 2009?

3 A. Yes.

4 Q. And what was your understanding of the facts
5 of the case in 2009 when you agreed to testify for
6 Actavis?

7 MR. MORIARTY: Objection.

8 Go ahead.

9 THE WITNESS: My understanding was that
10 Mr. McCornack was a gentleman who had died while on a
11 camping trip with his family. An autopsy had been
12 performed and an investigation conducted by a
13 coroner's office in California. Mr. McCornack was
14 taking a drug that was -- that had been recalled, and
15 the question that I was asked was to review the
16 material and provide the cause of death and manner of
17 death of Mr. McCornack.

18 BY MR. ERNST:

19 Q. What material were you given in 2009?

20 A. I was given a notebook of material that
21 contained the initial letter that's previously been
22 admitted to evidence; I was provided with medical
23 records, handwritten medical records; I was provided
24 with radiology, also, for Mr. McCornack; I was
25 provided with various pathology reports from biopsies

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1 that had been taken; I was provided with
2 electrocardiograph leads; I was also given medical
3 records from Dr. Von Dollen; I was given additional
4 lab material for Mr. McCornack; I was given
5 cardiovascular -- or cardiology consultant notes; I
6 was given the death certificate; I was given the
7 autopsy report; I was given toxicology results from
8 NMS Lab; I was given an --

9 Q. Was that -- pardon me. Was that the
10 toxicology result that had 3.6 nanograms per
11 milliliter of digoxin in his postmortem blood.

12 A. Including other determinations, as well.

13 I was also given a recall letter from CVS
14 Caremark. I was given --

15 Q. Now, can you date that -- the date of the
16 recall letter was what?

17 MR. MORIARTY: Don, this is really the
18 same binder that Dr. Heard (phonetic) had and that you
19 copied.

20 So you can tell him the date if it's
21 dated.

22 THE WITNESS: May of 2008.

23 BY MR. ERNST:

24 Q. Okay.

25 A. I was also given a press release of a recall

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1 from the U.S. Food and Drug Administration, dated
2 April 25th, 2008.

3 Q. And after reviewing that material -- were you
4 given any depositions at that point?

5 A. I don't remember what date I was provided
6 depositions.

7 Q. You agreed to testify shortly after you got
8 the binder?

9 A. I agreed to give my opinion, yes.

10 Q. And what did you tell Mr. Moriarty your
11 opinion was?

12 A. That based on the initial review of the
13 material, that Mr. McCornack died of natural disease,
14 not from an overdose or toxicity of digoxin.

15 Q. At the time that you told Mr. Moriarty this,
16 had you been given the amended death certificate of
17 Mr. McCornack?

18 A. Yes.

19 Q. And had you been given the amended autopsy
20 findings of prepared by Dr. Mason?

21 A. Yes.

22 Q. Had you been given his deposition transcript?

23 A. Again, I don't remember what date I was
24 provided with his transcript.

25 Q. What I would like to do is, this folder that

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1 you have in front of you, Doctor, is this the folder
2 that you received or the binder that you received in
3 2009 from Mr. Moriarty?

4 A. Yes.

5 Q. Had you added anything to it?

6 A. I'm sorry?

7 Q. Since -- have you added any documents to it
8 since 2009?

9 A. Have I added anything to it, or --

10 Q. Right.

11 A. No. I haven't added anything to it, no.

12 Q. And has it been in your possession since 2009?

13 A. It has.

14 Q. I would like your binder, in its entirety as
15 it currently sits, marked as Exhibit 5.

16 MR. ERNST: And for the court reporter's
17 issue, what I'd like to do is to just have her copy it
18 and put it in a binder just as it is and then furnish
19 it to me.

20 Now, Matt, you just took a document out
21 of the binder. What document did you take out?

22 MR. MORIARTY: The report -- or the
23 letter I sent her, which is here, was stuck with
24 static electricity to the front of the binder, the
25 original letter of which has been copied and marked as

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1 an exhibit. But I am going to pull documents from the
2 binder, because she has placed things subsequently
3 received into the pockets. So if you want Exhibit --
4 let me finish. If you want Exhibit 5 to be the
5 original binder, you're going to get it as the
6 original binder, and then you can ask her about
7 whatever else she subsequently received.

8 MR. ERNST: Well, what I'd like is -- I
9 can see it in front of her, and what I would like to
10 do is to have the binder -- and you just -- did you
11 take back your letter again, Mr. Moriarty?

12 MR. MORIARTY: It's sitting right here,
13 Don (indicating).

14 MR. ERNST: Well, thank you, I can't see
15 it. What I would like is to have the binder, as it
16 currently exists, marked as Exhibit 5, with all the
17 documents that currently you have in it, Dr. McMaster.

18 (Marked Exhibit No. 5.)

19 BY MR. ERNST:

20 Q. And then my question is: What documents do
21 you have in the binder now that weren't received in
22 2009?

23 MR. ERNST: And I would like to have her
24 have it in front of her, Matt, so that she can answer
25 that question.

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1 MR. MORIARTY: That's fine, Don, but I'm
2 going to look at it first to make sure there's nothing
3 beyond the Rule 26 requirements that might be in here.

4 MR. ERNST: Well, I can't see you do
5 that, Matt.

6 MR. MORIARTY: The court reporter is here
7 watching me, Don.

8 MR. ERNST: Thank you, Matt.

9 MR. MORIARTY: So you can ask her if I do
10 anything nefarious.

11 MR. ERNST: I'm not suggesting you would
12 do anything nefarious.

13 MR. MORIARTY: Now, there's a group of
14 materials in here that I'm removing, and I am
15 replacing them with copies, which I prepared for you
16 knowing you were going to ask this question; okay?

17 MR. ERNST: Why are you removing them,
18 Matt?

19 MR. MORIARTY: Because I'm replacing them
20 with copies and their originals.

21 MR. ERNST: Why -- she's going to get
22 this document back. I want it copied in the original
23 form.

24 MR. MORIARTY: I guess you don't trust
25 me. Fine, they're back in there.

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1 MR. ERNST: There's no reason to change
2 or -- make any changes. I want the binder marked in
3 its entirety as Exhibit 5, I want the court reporter
4 to copy it, and then all of the documents will be
5 returned to the doctor for her file.

6 MR. MORIARTY: It's done.

7 BY MR. ERNST:

8 Q. Now, Doctor, is there anything in that binder
9 that you have that we've now marked as Exhibit 5 that
10 you did not receive in 2009?

11 A. Yes.

12 Q. Please state for us what that is.

13 A. I have a --

14 Q. And identify it.

15 A. I have a CV from Keith Patrick Gibson.

16 Q. Okay.

17 A. I have an expert opinion of Mr. Keith Patrick
18 Gibson -- or, I'm sorry, Dr. Keith Patrick Gibson.

19 Q. Okay.

20 A. I have a request for professional billing that
21 I have already previously testified about regarding my
22 initial billing of this case.

23 Q. Okay.

24 A. I have an abstract from PubMed.

25 Q. What is the abstract of?

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1 A. The "Digoxin concentrations in postmortem
2 human tissues."

3 Q. By whom?

4 A. The first author's last name is McKercher,
5 M-C-K-E-R-C-H-E-R.

6 Q. Okay. Anything else?

7 A. Uh-huh, an abstract from the archives of
8 pathology and laboratory medicine, "Interpretation of
9 elevated postmortem serum concentrations of the
10 digoxin in infants and children."

11 Q. And where did you get that?

12 A. From PubMed.

13 Q. No, but where did you get the site to look at
14 PubMed? Was that given to you by Mr. Moriarty?

15 A. No, it was on my own.

16 Q. Okay. Go ahead.

17 A. I have a newsletter from "Clinical & Forensic
18 Toxicology News," dated March of 2004.

19 Q. Okay.

20 A. I have an article from the "British Journal of
21 Clinical Pharmacology" by Ferner, F-E-R-N-E-R.

22 Q. Now, all of these documents are in a folder in
23 the front or back of the binder; is that true?

24 A. They're in the back.

25 Q. They're in a pocket?

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1 A. They are.

2 Q. And are these all things that you placed in
3 this binder after 2009?

4 A. Yes.

5 Q. Well, how many more documents do we have
6 there?

7 A. I have a faxed copy where I faxed the initial
8 billing that I've previously testified to.

9 Q. Okay.

10 A. That's everything.

11 Q. And that's in the pocket of the binder; true?

12 A. Yes, sir.

13 Q. All right. Now, I want to go back to your
14 report on Exhibit 4. Can you get to your report,
15 please?

16 A. I can.

17 Q. There's a couple of things in your report that
18 I want to review and I want to ask you about. In your
19 review of the records of Dr. Gordon Lemm, did you see
20 that Mr. McCornack was compliant in taking his
21 medication?

22 A. I don't remember that specifically, no.

23 Q. Do you have any information that he was or was
24 not compliant?

25 MR. MORIARTY: Objection.

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1 THE WITNESS: I would have to go back and
2 review the specific records from Dr. Lemm specifically
3 addressing whether or not he was compliant with his
4 medicine.

5 BY MR. ERNST:

6 Q. As we sit here today, do you have an opinion
7 as to whether he was compliant or noncompliant with
8 taking his medication, specifically digoxin?

9 A. Well, since it was in his postmortem
10 toxicology, I assume he was taking it, yes.

11 Q. I know that you can assume that he was taking
12 it based upon the toxicological report, but my
13 question is: Do you have an opinion as to whether or
14 not he followed the directions of his physician and
15 took it in an appropriate and regular fashion?

16 A. I have no way to form that opinion based on
17 what I've been given.

18 Q. So you do not have an opinion about whether or
19 not he was compliant in taking his medication on a
20 regular basis or not; true?

21 A. Well, I know that he was taking it at the time
22 of his death, because it's present in his postmortem
23 blood.

24 MR. ERNST: I will have my last question
25 read back, please.

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1 (The requested portion was read back.)

2 THE WITNESS: I'm sorry, I've already
3 answered it. Is there another part to the question?

4 BY MR. ERNST:

5 Q. Doctor, you do not have an opinion as to
6 whether or not he took his medication regularly, do
7 you?

8 A. No.

9 Q. You don't have any information that he did not
10 take his medication regularly and properly, do you?

11 A. No. I would defer to his clinical treating
12 physicians to make that assessment.

13 Q. Thank you, Doctor.

14 Now, there is the NMS Lab report that was
15 taken of the blood of Mr. McCornack following his
16 death. Do you have that?

17 A. I do.

18 MR. ERNST: Let's mark that as Exhibit 6.

19 (Marked Exhibit No. 6.)

20 BY MR. ERNST:

21 Q. And I understand that it's contained in your
22 book of Exhibit 5, but we're going to make a copy of
23 it so that we will have it separate so we can easily
24 find it and discuss it.

25 Do you have any issues with the methodology

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1 that was utilized in testing the blood of
2 Mr. McCornack where it was determined that he had 3.6
3 nanograms per milliliter of digoxin in his blood
4 postmortem?

5 A. No.

6 MS. AHERN: Objection.

7 BY MR. ERNST:

8 Q. Now, Doctor, from your training and experience
9 as a forensic pathologist -- and that's what you
10 consider yourself to be, right, a forensic
11 pathologist?

12 A. Yes. I'm also considered to be that by the
13 American Board of Pathology.

14 Q. All right. Please state for the record what
15 your understanding is of the therapeutic values of
16 digoxin in a living person?

17 A. I think the therapeutic value in a living
18 person is variable, and it will vary from patient to
19 patient.

20 Q. Is it generally understood that the
21 therapeutic value is .5 to 2.0 for digoxin?

22 A. I think it's fair that there are
23 recommendations for the level of digoxin; however,
24 certain patients may need a higher level and be
25 maintained on a higher or lower level.

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1 Q. Please state for me what the recommendations
2 are for therapeutic values of digoxin in a living
3 person as you understand them to be?

4 A. Well, as I've previously testified to, it's
5 variable from person to person, and the patients are
6 titrated to effect, as opposed to a specific number
7 for a blood level.

8 Q. Isn't it true that the generally accepted
9 recommendations for therapeutic values of digoxin in
10 the bloodstream of a living person is .5 to 2.0?

11 MR. MORIARTY: Objection.

12 Go ahead.

13 THE WITNESS: Yeah, I think I've answered
14 that twice already and would be happy to provide you
15 with the same answer again.

16 BY MR. ERNST:

17 Q. I want to know what the numbers are for the
18 recommendation of digoxin, Doctor.

19 MR. MORIARTY: Objection; asked and
20 answered.

21 BY MR. ERNST:

22 Q. As your understanding.

23 MR. MORIARTY: Objection; asked and
24 answered three or four times now.

25 MR. ERNST: She has not given me any

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1 numbers, and I will re-ask the question, Mr. Moriarty.

2 MR. MORIARTY: She's not required to give
3 you numbers. She's answered the question medically.

4 BY MR. ERNST:

5 Q. Please state for me what your understanding is
6 of a toxic level of digoxin in a person's bloodstream
7 when they are living?

8 MR. MORIARTY: Objection.

9 MS. AHERN: Objection.

10 MR. MORIARTY: Go ahead.

11 THE WITNESS: It depends on the patient.

12 BY MR. ERNST:

13 Q. As far as the literature is concerned, isn't
14 it accurate to state that the level for digoxin
15 therapeutic values in a living person is .5 to 2.0?

16 MS. AHERN: Objection.

17 MR. MORIARTY: Objection.

18 Go ahead.

19 THE WITNESS: Again, my answer remains
20 that it depends on the clinical circumstance of the
21 patient and not one individual level of digoxin in the
22 blood.

23 BY MR. ERNST:

24 Q. So is it your testimony that a person could
25 have a digoxin level of 3.6 in a living tissue and you

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1 think that would be just fine, Doctor?

2 MR. MORIARTY: Objection; form.

3 Go ahead.

4 THE WITNESS: It depends on the symptoms
5 and the clinical picture of the patient and how they
6 present.

7 BY MR. ERNST:

8 Q. Okay. Look, I just want to try and get an
9 answer out of you as to what your understanding is of
10 the therapeutic range that is generally medically
11 accepted for digoxin in a living person. I know that
12 you say it "depends," but my question is:
13 Numerically, as a physician, a trained scientist,
14 please state for the record what your understanding is
15 of the therapeutic levels that is generally medically
16 accepted to be therapeutic for digoxin?

17 MR. MORIARTY: Objection; form and
18 otherwise.

19 Go ahead and answer.

20 THE WITNESS: My previous answer remains,
21 that it depends on the clinical symptoms and the
22 clinical presentation of the patient.

23 BY MR. ERNST:

24 Q. All right. It depends on the clinical
25 presentation of the patient, I understand that,

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1 Doctor, and you have just said that. So in your
2 opinion, what is the range that you would find
3 acceptable for digoxin in a living patient, the low
4 and the high, please?

5 MR. MORIARTY: Objection.

6 MS. AHERN: Objection.

7 MR. MORIARTY: Asked and answered.

8 THE WITNESS: It depends on the clinical
9 presentation of the patient.

10 BY MR. ERNST:

11 Q. All right, I understand that for the clinical
12 presentation of the patient. My question is: In the
13 range of human experience, please state for me what
14 your opinion is of the low range of digoxin levels in
15 a bloodstream for treatment purposes and the high
16 range, whatever those numbers are?

17 MR. MORIARTY: Objection.

18 Don't answer that.

19 You've asked the same question at least
20 eight times. Ask a different question.

21 MR. ERNST: Mr. Moriarty --

22 MR. MORIARTY: Yes, sir.

23 MR. ERNST: -- I don't believe that's an
24 appropriate objection, and I will have my last
25 question read back.

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1 MR. MORIARTY: Don --

2 BY MR. ERNST:

3 Q. And, Doctor, I would ask you to answer the
4 question.

5 MR. MORIARTY: Don, you've asked the same
6 question eight times. You've tried a couple times at
7 a different angle and I didn't object. If you want to
8 know what the lab slips say, ask her that; if you want
9 to know what the literature says on the product label,
10 ask her that. But that's not what you're asking. So
11 please ask a different question.

12 MR. ERNST: All right, Mr. Moriarty,
13 we'll just continue on this line of questioning.

14 BY MR. ERNST:

15 Q. Doctor, what's on the product label for
16 digoxin for therapeutic values?

17 A. I don't know.

18 Q. What is on the lab slips for digoxin -- for
19 the acceptable range of therapeutic value for digoxin?

20 A. According to the Twin Cities Community
21 Hospital, on a report dated August 2nd of 2001, their
22 reported reference range is between 0.8 and 2.0.

23 Q. Do you agree with that, Doctor?

24 A. I would defer to their expertise in that.

25 Q. So you would acknowledge that the therapeutic

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1 range is from .8 to 2.0?

2 A. I would acknowledge that that is a
3 recommendation; however, my previous answer stands,
4 that it depends on the patient's presentation and
5 their symptoms at any one particular level.

6 Q. Going back to that August 2nd, 2001 lab slip,
7 what was the level that Mr. McCornack had in his blood
8 of digoxin?

9 A. 1.7 nanograms per milliliter.

10 Q. And do you -- as you sit here today, under
11 oath, do you have knowledge of what the test ranges
12 were for Mr. McCornack for all the years that he was
13 tested for digoxin?

14 A. Not without looking at each particular one,
15 no.

16 Q. You have them in front of you, don't you?

17 A. Yes.

18 Q. Isn't it accurate to state that they range
19 from 1.6 to 1.8 for all the years that he was tested?

20 A. I didn't memorize each particular level, but,
21 again, I have the labs in front of me, if you'd like
22 for me to flip through and look?

23 Q. Well, sure, just give us the numbers that he
24 had in his bloodstream, Doctor.

25 MR. MORIARTY: Can you give us the dates

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1 so she doesn't have to look through every page?

2 MR. ERNST: Well, I thought -- she's got
3 her book there and she's got the lab reports.

4 MR. MORIARTY: That's fine. I thought it
5 would be more efficient since you know when they all
6 were.

7 BY MR. ERNST:

8 Q. Is it important for you, Doctor -- while
9 you're looking, is it important for you to know what
10 his blood level was during his lifetime to render your
11 opinions?

12 MR. MORIARTY: Objection.

13 Go ahead.

14 BY MR. ERNST:

15 Q. Blood level of digoxin?

16 A. Any of his clinical indicators or any of his
17 clinical history is helpful for me to know, yes.

18 Q. Well, as you sit here today rendering your
19 opinion, please state for me what your understanding
20 is of his digoxin blood levels during his lifetime for
21 the multiple times that he was tested during his
22 lifetime, before his death.

23 A. I don't have any independent recollection that
24 he had a problem with the digoxin toxicity during his
25 lifetime.

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1 Q. Well, in looking at the tests, is it safe to
2 say that they're somewhere between 1.6 and 1.8,
3 Doctor?

4 A. Well, I've just reached another digoxin
5 reading that is dated from -- February 20th, 2004,
6 that's 1.8 nanograms per milliliter.

7 MR. MORIARTY: So I found a list of them,
8 Don. Do you want me to go through them, or do you
9 want to watch her flip through her book?

10 MR. ERNST: Sure, let's save some time.
11 Give her the list, Matthew.

12 MR. MORIARTY: March of 1995 was 1.4;
13 August 1st, 2001, 1.7; November 2002, 1.5;
14 February 2004, 1.8; July 2006, 1.5; May 2007, 1.6.

15 BY MR. ERNST:

16 Q. Now, Doctor, do you agree that those are
17 accurate numbers given by Mr. Moriarty, because while
18 he's saying that, I want your testimony. Do you agree
19 with that, Doctor?

20 A. I have not, so far, been provided with any
21 information that his digoxin level is above 2.0.

22 Q. Well, in fact, you haven't had any provided
23 information to say digoxin was ever above 1.8, have
24 you?

25 A. Okay, fine, 1.8.

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1 Q. Now, under oath, do you adopt those numbers
2 that Mr. Moriarty has just testified to as being
3 accurate, based on your training, experience, and
4 knowledge and review of the records?

5 A. Sure, I have no reason to disbelieve them.

6 Q. All right. Now, postmortem, looking at
7 Exhibit 6, his blood level was 3.6 nanograms per
8 milliliter; true?

9 A. That's what the reading was in his postmortem
10 blood, yes.

11 Q. And that is above the therapeutic level; true?

12 MR. MORIARTY: Objection.

13 Go ahead.

14 THE WITNESS: By numbers alone, it is,
15 yes; however, that number is not a true reflection of
16 what the antemortem level of digoxin was.

17 BY MR. ERNST:

18 Q. And the reason you believe it's not a true
19 reflection is because of the scientific item that you
20 call "postmortem redistribution"; true?

21 A. Yes, I would call postmortem redistribution a
22 well and generally accepted principle in forensic
23 pathology.

24 Q. And, in fact, Doctor, in your report on
25 page 2, at the bottom of the page, you have cited a

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1 textbook. It's Baselt, Eighth Edition, "Disposition
2 of Toxic Drugs and Chemicals in Man," from 2008; true?

3 A. True.

4 Q. Now, tell me about that textbook. Is that
5 used in medical schools, Doctor?

6 A. I did not use it in medical school.

7 Q. Well, you've cited it in your report. I know
8 you graduated long before 2008, forgive me, but the
9 Baselt book is a textbook; true?

10 A. It is.

11 Q. And where is it utilized?

12 A. Well, I use it on -- in my daily practice as a
13 forensic pathologist.

14 Q. How do you use it in your daily practice as a
15 forensic pathologist? Describe it generally.

16 A. I use it for several reasons: one, general
17 information about drugs; two, general information
18 about the pharmacology of drugs; three, for general
19 guidelines for reference ranges for possible toxic and
20 therapeutic and potentially lethal levels of drugs;
21 and for information regarding the issue of postmortem
22 redistribution.

23 Q. Postmortem redistribution is very important to
24 you as a forensic pathologist because it can affect
25 your opinions as to cause of death; true?

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1 A. Yes.

2 Q. Now, this Baselt book is peer reviewed; true?

3 MR. MORIARTY: Objection.

4 Go ahead.

5 THE WITNESS: Most of the material that's
6 in it is derived from peer-reviewed sources.

7 BY MR. ERNST:

8 Q. And you trust it and rely upon it?

9 A. I do rely on it, yes.

10 Q. And you trust it?

11 A. I believe that the information contained in it
12 is accurate.

13 Q. And looking at your report on page 2, in the
14 last full sentence, I want to read it to you and see
15 if it's accurate: "In fact," comma, "it has been
16 determined that serum digoxin levels nearly always
17 increase after death due to leaking from the muscle,
18 with an average antemortem," slash, "postmortem ratio
19 ranging from 1.42 for femoral," or femoral (phonetic),
20 "vein blood specimens to 1.96 for heart blood
21 specimens," and open parens, "'Disposition of Toxic
22 Drugs and Chemicals in Man,' Eighth Edition, Baselt
23 2008." Is that an accurate statement?

24 A. Yes.

25 Q. And that is something that you have relied on

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1 in rendering your opinions; true?

2 MR. MORIARTY: Objection.

3 Go ahead.

4 THE WITNESS: Yes.

5 BY MR. ERNST:

6 Q. Now, Doctor, that is a scientific basis for
7 some of your opinions; true?

8 MR. MORIARTY: Objection.

9 Go ahead.

10 MS. AHERN: Objection.

11 THE WITNESS: Yes.

12 BY MR. ERNST:

13 Q. And you believe that it's scientifically sound
14 and peer reviewed; true?

15 MR. MORIARTY: Objection.

16 THE WITNESS: As I previously testified
17 to, the material contained in the book is pulled from
18 peer-reviewed sources, generally.

19 BY MR. ERNST:

20 Q. Now, this sentence that you have cited I want
21 to talk about specifically. You have reviewed the
22 autopsy report of Dr. Mason; true?

23 A. Right.

24 Q. Did you review his deposition?

25 A. I did.

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1 Q. And were you aware that the blood drawn from
2 Mr. McCornack by Dr. Mason was peripheral blood?

3 MR. MORIARTY: Objection.

4 Go ahead.

5 THE WITNESS: No. It's my understanding
6 that it was axillary blood, which I do not necessarily
7 consider a peripheral source.

8 BY MR. ERNST:

9 Q. You're aware that Dr. Mason testified that it
10 was a peripheral source and checked the box when he
11 sent the specimen off to NMS Labs? Do you recall
12 that?

13 A. I do. I believe that it was Dr. Mason's
14 opinion.

15 Q. Now, as you sit here today, do you know how
16 Dr. Mason got the blood out of the axial vein?

17 A. Yes.

18 Q. Isn't it true that he sliced the vein and then
19 press-lifted the wrist and pressed the blood out of
20 the vein all the way down the arm and collected it for
21 his sample?

22 MR. MORIARTY: Objection.

23 Go ahead.

24 THE WITNESS: That was his description of
25 how he obtained the specimen, yes.

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1 BY MR. ERNST:

2 Q. Now, that would be considered peripheral
3 blood; isn't that true?

4 A. Again, as I previously testified to, in this
5 case, axillary blood is not a true peripheral
6 specimen.

7 Q. That's your opinion; right?

8 A. Based on my training and experience, yes, it's
9 my opinion.

10 Q. You're aware that Dr. Mason has concluded that
11 it was peripheral blood; true?

12 A. I've answered that, yes.

13 Q. And he took the sample; true?

14 A. Yes, it's my understanding that Dr. Mason drew
15 the sample.

16 Q. And that is a reasonable difference of
17 opinions between forensic pathologists, isn't it?

18 MR. MORIARTY: Objection.

19 MS. AHERN: Objection.

20 THE WITNESS: Again, I've stated my
21 opinion that it is not a true peripheral specimen.

22 BY MR. ERNST:

23 Q. Doctor, it's reasonable for Dr. Mason to have
24 the opinion that it's peripheral blood because he took
25 it from the arm from the wrist down; isn't that true?

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1 MR. MORIARTY: Objection. You're trying
2 to argue. She's answered that question already.

3 Go ahead.

4 THE WITNESS: I think it's reasonable,
5 obviously, for Dr. Mason to have his own opinion; I
6 disagree with it on a scientific basis.

7 BY MR. ERNST:

8 Q. Okay. Now, Doctor, the "Disposition of Toxic
9 Drugs and Man" article that you cite, if it's
10 peripheral blood and you factor back the 1.42
11 antemortem, slash, postmortem ratio, and you compute
12 the numbers, isn't it true that the blood sample for
13 Mr. McCornack turns out to be over 2.4?

14 MR. MORIARTY: Objection.

15 Go ahead.

16 THE WITNESS: Well, (a), I don't agree
17 that it's a peripheral specimen, and I don't agree
18 that you necessarily can use the 1.42 number for back
19 extrapolation.

20 BY MR. ERNST:

21 Q. What number would you use for back
22 extrapolation, Doctor?

23 A. Well, I would not back extrapolate.

24 Q. Well, you're aware that the Baselt textbook
25 says that you can back extrapolate based on the

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1 numbers that you've included in your report; true?

2 MR. MORIARTY: Objection.

3 THE WITNESS: Well, no, that's not what
4 the Baselt information states.

5 BY MR. ERNST:

6 Q. Doesn't the -- in your own report state that
7 an average antemortem, slash, postmortem ratio ranging
8 from 1.42 for femoral blood -- vein blood, isn't that
9 what that means?

10 MR. MORIARTY: Objection.

11 Go ahead.

12 THE WITNESS: Yes, I agree that the
13 average antemortem/postmortem ratio was 1.42 for
14 femoral blood specimen.

15 BY MR. ERNST:

16 Q. Doctor, if you assume that the blood specimen
17 taken from Mr. McCornack was peripheral -- I want you
18 to assume that -- then wouldn't it be accurate to
19 state that, computing back from the postmortem blood
20 level to the antemortem blood level would produce a
21 digoxin level in Mr. McCornack's blood of over 2.4?

22 MR. MORIARTY: Objection.

23 Go ahead.

24 THE WITNESS: No. As I've previously
25 stated, it's not a true peripheral specimen, and 1.42

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1 is simply an average. Some of the values are much
2 higher, and some could be much lower.

3 BY MR. ERNST:

4 Q. So, in fact, the range of Mr. McCornack's
5 blood before his death could be as high as 3.0; true?

6 MR. MORIARTY: Objection.

7 MS. AHERN: Objection.

8 MR. MORIARTY: Go ahead.

9 BY MR. ERNST:

10 Q. Using -- using the Baselt textbook
11 methodology?

12 MR. MORIARTY: Objection; form.

13 Go ahead.

14 THE WITNESS: I think, scientifically,
15 the point is that the level that was drawn in his
16 postmortem blood is not an indicator of what the
17 antemortem blood level of digoxin was.

18 BY MR. ERNST:

19 Q. Well, you certainly have to agree that he had
20 digoxin in his system; true?

21 A. Yes, I agree with that.

22 Q. And the 3.6 number means something; right?

23 A. It means that he had 3.6 nanograms per
24 milliliter of digoxin in his postmortem blood
25 specimen.

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1 Q. If you take that 3.6-nanograms-per-milliliter
2 blood specimen after his death and apply the Baselt
3 textbook ratio of antemortem to postmortem for
4 peripheral blood of 1.42, you come up with a level
5 that exceeds the recommended therapeutic value for
6 digoxin; isn't that true?

7 MR. MORIARTY: Objection. There is
8 nowhere in that sentence that they talk about
9 peripheral, so -- and you have asked this question and
10 she's answered it.

11 Go ahead and tell him again.

12 THE WITNESS: Again, this is not a
13 peripheral blood specimen. And the point of this
14 blood level means that the antemortem level cannot be
15 inferred simply from the postmortem digoxin level
16 alone.

17 BY MR. ERNST:

18 Q. Would you agree that the average
19 antemortem/postmortem ratio ranging from 1.42 for
20 femoral vein blood is accurate?

21 MR. MORIARTY: Objection.

22 Go ahead.

23 THE WITNESS: I would agree that that's
24 the information that's provided in the Baselt textbook
25 that I have quoted in my report.

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1 BY MR. ERNST:

2 Q. And would you agree that the
3 antemortem/postmortem ratio for heart blood is 1.96?

4 MR. MORIARTY: Objection.

5 Go ahead.

6 THE WITNESS: Yes, I would agree that
7 that's the information that's provided in my report.

8 BY MR. ERNST:

9 Q. So do you have an opinion as to what the
10 axillary blood value would be, someplace between 1.42
11 and 1.96; right?

12 A. No, not necessarily.

13 Q. Well, what do you think it is for an axillary
14 blood --

15 MR. MORIARTY: Objection.

16 Go ahead.

17 BY MR. ERNST:

18 Q. What do you think the ratio is, Doctor?

19 MR. MORIARTY: Objection.

20 Go ahead.

21 THE WITNESS: There's no scientific basis
22 to make an estimate.

23 BY MR. ERNST:

24 Q. Well, would you agree that, as a peripheral
25 blood sample, that it's someplace between 1.42 and

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1 1.96?

2 MR. MORIARTY: Objection; asked and
3 answered.

4 Go ahead.

5 THE WITNESS: As I previously testified
6 to, no, that inference cannot be made.

7 BY MR. ERNST:

8 Q. Would you acknowledge that the blood from the
9 axillary vein would be -- as far as
10 antemortem/postmortem ratio, would be less than for
11 heart blood?

12 MR. MORIARTY: Objection.

13 Go ahead.

14 MS. AHERN: Objection.

15 THE WITNESS: No. I think I've answered
16 that probably at least twice now, that a scientific
17 inference about the level of postmortem redistribution
18 and axillary vein cannot be inferred from the
19 information that's provided.

20 BY MR. ERNST:

21 Q. So you disagree with the Baselt textbook --
22 this sentence in the Baselt textbook; true?

23 A. I don't know on what basis you're making that
24 inference.

25 Q. Well, the Baselt textbook just states, as it

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1 does in your report, that you can compute the average
2 antemortem/postmortem ratio from a postmortem sample;
3 isn't that true?

4 MR. MORIARTY: Objection. That is not
5 what that says. Represent this accurately.

6 Go ahead, answer his question.

7 THE WITNESS: No.

8 BY MR. ERNST:

9 Q. Now, do you believe that Mr. McCornack died of
10 sudden cardiac death?

11 A. Sudden cardiac death is not a diagnosis.

12 Q. Well, how do you believe that Mr. McCornack
13 died?

14 A. I believe he died from hypertensive
15 cardiovascular disease.

16 Q. Right, but how did he die? What caused --
17 what was the -- from your point of view, did his heart
18 stop beating?

19 A. Well, obviously, everyone who dies, their
20 heart stops beating.

21 Q. Right. Well, tell me what you think happened
22 to Mr. McCornack's heart.

23 A. I don't believe I understand your question.

24 Q. Well, you mention in your report, in the
25 second paragraph on page 2, that Mr. McCornack had a

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1 number of cardiac findings capable of causing sudden
2 cardiac death. Do you see that?

3 A. I do, in the first paragraph.

4 Q. Now, you used the term "sudden cardiac death,"
5 what did you mean by that?

6 A. In my terminology, sudden cardiac death means
7 someone who dies from a cardiac-related problem,
8 cardiac-related disease, that typically has an acute
9 onset.

10 Q. Do you believe that happened to Mr. McCornack?

11 A. I do.

12 Q. All right. So you believe that Mr. McCornack
13 had a sudden cardiac death event?

14 A. Yes.

15 Q. All right. Now, isn't it true that digoxin
16 toxicity can cause a sudden cardiac death event?

17 MR. MORIARTY: Objection; form.

18 Go ahead.

19 THE WITNESS: I think it's true that in
20 the differential of sudden cardiac death, you have to
21 include certain toxicology causes, one of which may be
22 digoxin toxicity.

23 BY MR. ERNST:

24 Q. Now, in your report, you don't state that
25 digoxin can cause sudden cardiac death, do you?

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1 A. No, nor do I list the other hundreds of things
2 that can cause sudden cardiac death, as well.

3 Q. Now, Doctor, were you aware that the drug that
4 was being taken, digoxin, by Mr. McCornack, in the
5 form of Digitek« produced by Actavis, was recalled?

6 A. I was aware that a recall had been issued and
7 he potentially had received some of that medication.

8 Q. Were you aware that he had, in fact, received
9 the recalled medication?

10 A. Yes.

11 Q. Were you aware that he had received a letter
12 addressed to him about the recalled medication?

13 A. Well, the letter from CVS Caremark is
14 addressed "Dear Planned Participant," it doesn't have
15 a particular name on it.

16 Q. Right. Well, were you aware that Mr. -- in
17 your documents there, were you aware that
18 Mr. McCornack had been given a specifically addressed
19 letter to him?

20 A. I don't have that independent recollection,
21 no.

22 Q. So would it be important to you in rendering
23 your opinions that, in fact, Mr. McCornack would have
24 been sent this letter, specifically addressed to him,
25 that the medication he was taking was recalled?

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1 A. Sure. Any clinical information regarding a
2 drug a patient is taking would be important for me to
3 know about.

4 Q. But that letter specifically addressed to
5 Mr. McCornack is not in your material, is it?

6 A. I don't have an independent recollection of a
7 letter that was addressed specifically to
8 Mr. McCornack; however, I do have one that indicates
9 that, potentially, the drug that he was taking was
10 involved in the recall.

11 Q. Right. Now, what's the date of that letter?

12 A. May of 2008.

13 Q. May what? May what?

14 A. May of 2008, is all it states on the letter.

15 Q. All right. And when did Mr. McCornack die?

16 A. March 23rd of 2008.

17 Q. So would it be important for you to know that
18 Mr. McCornack died, and then some five weeks after his
19 death he gets a recall notice for the medication he
20 was taking?

21 MS. AHERN: Objection; argumentative.

22 THE WITNESS: In my practice, if any
23 additional information comes to light after I have
24 ruled on the cause of death and the manner of death, I
25 am certainly willing to consider that information.

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1 BY MR. ERNST:

2 Q. Right, and as a pathologist, you want to do
3 the right thing, don't you?

4 MR. MORIARTY: Objection.

5 Go ahead.

6 MS. AHERN: Objection.

7 THE WITNESS: What do you mean by "do the
8 right thing"? That's a rather general term.

9 BY MR. ERNST:

10 Q. Well, if you've come across information
11 following an additional report that you've rendered a
12 cause-of-death opinion that might change that opinion,
13 you would change your mind, wouldn't you?

14 A. What I previously testified to, that I would
15 consider all information that was provided to me after
16 I had already ruled on the cause of death and manner
17 of death. I will consider it, it doesn't necessarily
18 mean it will change my opinion.

19 Q. Are you aware that when Dr. Mason first
20 rendered his opinion about the death of Mr. McCornack,
21 that he did not have the recall notice from Actavis
22 because it hadn't been issued yet?

23 A. Correct. However, he did have the toxicology
24 results from the digoxin, so I felt like he had enough
25 information to make a cause-and-manner-of-death

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1 diagnosis.

2 Q. Well, when was the toxicology report from the
3 digoxin rendered? What's that date?

4 A. June 24th of 2008.

5 Q. Right. And isn't the initial report of
6 Dr. Mason, in March of 2008, before the recall notice
7 and before he had knowledge of the digoxin level of
8 3.6?

9 A. Well, the -- March 26th, 2008, is the date of
10 autopsy. I don't see a date that Dr. Mason signed the
11 autopsy report.

12 Q. Would you acknowledge that after Dr. Mason
13 originally rendered his opinion, that there was a
14 recall notice and there was a digoxin test level that
15 was done that came back 3.6?

16 MR. MORIARTY: Objection. She just
17 answered that question, Don.

18 THE WITNESS: Yes, I would agree with
19 that.

20 BY MR. ERNST:

21 Q. And that those are factors that you, as a
22 pathologist, would want to consider in formulating an
23 opinion as to the cause of death?

24 A. Yes.

25 Q. Those are reasonable factors to consider;

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1 wouldn't you agree?

2 A. Yes.

3 Q. And we've already established that sudden
4 cardiac death, as you've described it, can be caused
5 by digoxin toxicity; true?

6 MR. MORIARTY: Objection; form.

7 Go ahead.

8 THE WITNESS: That is one of many causes
9 of sudden cardiac death.

10 BY MR. ERNST:

11 Q. And isn't it true that if you assume that you
12 can take an antemortem/postmortem ratio of blood, that
13 if you factor back the 3.6 postmortem blood level of
14 digoxin, then it's reasonable for Dr. Mason to look at
15 what his opinion would be for a antemortem or
16 pre-death digoxin level?

17 A. I don't believe I understand your question.

18 Q. Well, wouldn't a doctor like yourself, as a
19 forensic pathologist, want to look at the literature
20 and see if you can compute what the antemortem level
21 of digoxin was from a postmortem test?

22 A. Yes, I did. And as I've previously testified
23 to, it's not scientifically valid to do that.

24 Q. Well, that's not what the Baselt textbook
25 says, though, is it?

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1 MR. MORIARTY: Objection.

2 BY MR. ERNST:

3 Q. It says that you can compute it?

4 MR. MORIARTY: Objection; asked and
5 answered, and that's not what it says. If you want to
6 say that that's what it says, you better read it to
7 her.

8 MR. ERNST: I'm reading from her report.

9 MR. MORIARTY: That's not what it says in
10 her report either.

11 MR. ERNST: I'll have my last question
12 re-read, please.

13 (The requested portion was read back.)

14 THE WITNESS: So my answer is, yes, I
15 would look at that, and the answer is also, no, it
16 cannot be reliably scientifically estimated.

17 BY MR. ERNST:

18 Q. Are you aware of the War/Paul (phonetic)
19 article conducted in the '70s, where they actually
20 come up with the numbers of 1.42 per peripheral blood
21 samples?

22 MR. MORIARTY: Objection.

23 Go ahead.

24 THE WITNESS: I'm aware of the article,
25 yes.

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1 BY MR. ERNST:

2 Q. That article was peer reviewed, wasn't it?

3 A. I would have to -- I don't have the article in
4 front of me. I'm aware of the article. I don't know
5 any of the other specifics about whether or not it was
6 peer reviewed.

7 Q. Well, there's an article that's out there that
8 says you can compute antemortem blood levels from
9 postmortem testing; isn't that true?

10 MR. MORIARTY: Objection. That is not
11 what it says and you know it.

12 You go ahead and answer that question.

13 Stop being dishonest with these
14 witnesses, Don.

15 Go ahead.

16 THE WITNESS: No, that's not --

17 MR. ERNST: Mr. Moriarty, if you persist
18 in this line of diatribe, I will adjourn this
19 deposition. I have never made such statements to you
20 in a deposition, I find it offensive, and I resent it,
21 and I think it's unprofessional and inappropriate. If
22 you have an objection to place on the record, you
23 should do so, but I will not accept a malignment of my
24 questioning to this witness. It is offensive, Matt,
25 and it is beneath you.

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1 I think we should take a break for
2 five minutes. Let's go off the record.

3 (Brief recess was observed.)

4 MR. ERNST: Would you read back the last
5 question, please.

6 (The requested portion was read back.)

7 MR. MORIARTY: Objection.

8 Go ahead.

9 THE WITNESS: No, that's not my
10 understanding of the conclusions of the article.

11 BY MR. ERNST:

12 Q. Doctor, you have testified, from 1 to 25
13 times, in criminal cases in which people are being
14 prosecuted for crimes about drug overdose causing
15 death; true?

16 A. That's correct.

17 Q. And you have used postmortem drug tests to
18 reach those conclusions; isn't that true?

19 A. Yes.

20 Q. And, Doctor, it is not uncommon for forensic
21 pathologists to use postmortem drug levels to reach
22 conclusions about drugs that were taken and levels of
23 the drug in a bloodstream before death, is it?

24 MR. MORIARTY: Objection; compound.

25 Go ahead.

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1 THE WITNESS: I would agree with that.

2 BY MR. ERNST:

3 Q. Now, Doctor, do you have an opinion about the
4 length of time that redistribution takes to reach an
5 equilibrium in the blood following death?

6 A. No.

7 Q. Do you have an opinion about the length of
8 time that a postmortem blood sample is taken that can
9 affect redistribution levels?

10 A. Yes.

11 Q. And what is that opinion?

12 A. That, with some drugs, the longer the
13 postmortem interval, the more the level of postmortem
14 redistribution.

15 Q. And do you have an opinion about digoxin?

16 A. In regards to what?

17 Q. Postmortem redistribution and the equilibrium
18 reached in the bloodstream?

19 MR. MORIARTY: Objection.

20 Go ahead.

21 THE WITNESS: You're going to have to
22 repeat your question, I don't really understand what
23 you're asking me.

24 BY MR. ERNST:

25 Q. Sure. I want to know if you have an opinion

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1 about the length of time that can affect
2 redistribution levels of digoxin. Is it one hour, ten
3 hours, a hundred hours, what is it?

4 A. No, there's not any one particular time. I
5 think what I've previously testified to, that
6 postmortem redistribution is a significant factor in
7 interpretation of postmortem blood levels of digoxin,
8 and that the postmortem digoxin level alone cannot be
9 used to diagnose digoxin toxicity as a cause of death.

10 Q. And your -- well, "alone," but it should be --
11 let's go through that. What factors should be
12 considered by a coroner to determine if digoxin was a
13 factor in a cause of death? Let's go through the
14 factors; okay?

15 A. Well, I'm not testifying as a coroner. To be
16 clear, I'm testifying as a forensic pathologist, and
17 there's a vast difference between the two. So would
18 you like my answer as a forensic pathologist?

19 Q. Sure, let's go through it. Would you agree
20 that as a forensic pathologist that you would consider
21 a postmortem blood sample test for digoxin, as a
22 factor?

23 A. Of course I would consider it.

24 Q. Would you consider the autopsy itself and the
25 examination of the heart?

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1 A. Of course.

2 Q. Would you consider a blood sample taken from
3 what you consider to be a peripheral vein?

4 A. I don't think that I consider it to be a
5 peripheral vein.

6 Q. I know, but you can -- if it was a peripheral
7 vein, that's where you would normally take a blood
8 sample to be tested; isn't that true?

9 A. I take peripheral blood from the femoral
10 vessels, not from axillary.

11 Q. All right. That's your methodology; right?

12 A. It's my methodology, it's also the methodology
13 of all the physicians I practice with and physicians
14 in which I've trained as a forensic pathologist.

15 Q. Well, let's just assume that you would take
16 blood from what you considered to be a peripheral
17 vein; is that true?

18 A. Yes.

19 Q. And you would take the postmortem blood test,
20 that's a factor; true?

21 A. Yes.

22 Q. And you would review the medical records of
23 the patient before his death; true?

24 A. If they're available, yes.

25 Q. And you would talk to the witnesses about the

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1 behavior of the -- or have information about what the
2 witnesses said about the behavior of the witness
3 before his death; true?

4 A. Yes. I would gain information. I may not
5 talk to the witnesses myself. It may be done under my
6 direction or another investigative agency. But I
7 certainly would consider their behavior and their
8 physical condition and the scene of their death as
9 part of the final determination.

10 Q. Is there anything else that you would
11 consider, Doctor? Would you do research and look at
12 articles and paperwork, or articles about, perhaps,
13 redistribution?

14 A. If I deem it necessary, yes.

15 Q. Is there anything else that you would look at
16 that you can think of generically that you would
17 render an opinion about -- or that you would want
18 before you rendered your opinion about a cause of
19 death?

20 A. Sure. Any other information that might be
21 considered pertinent regarding the circumstances of
22 one's death, so, yes, there are other factors I would
23 consider.

24 Q. Recall notices, for instance --

25 A. Yes.

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1 Q. -- for drugs that he was taking at the time?

2 A. Yes, I've previously testified to that.

3 Q. You've read Dr. Mason's deposition; true?

4 A. Yes.

5 Q. Is there anything that you believe he should
6 have considered in rendering his opinion and didn't?

7 MR. MORIARTY: Objection.

8 Go ahead.

9 THE WITNESS: Yes. I think he should
10 have considered postmortem redistribution of digoxin,
11 and he should have considered that that level alone
12 cannot be used to diagnose digoxin toxicity as the
13 cause of death.

14 BY MR. ERNST:

15 Q. That's a difference of opinion that you have
16 with Dr. Mason; true?

17 A. It is, and I'm simply answering your question
18 to other things that he should have considered.

19 Q. All right. Well, I'm asking about factual
20 things that he should have considered, such as, he
21 had, you know, autopsy findings, he had interviews, he
22 had investigation at the scene, any of those objective
23 factors, is there anything else that you think
24 Dr. Mason should have done and didn't do?

25 MR. MORIARTY: Objection.

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1 Go ahead.

2 THE WITNESS: Well, I consider postmortem
3 redistribution factual. So, yes, I believe he should
4 have considered that.

5 BY MR. ERNST:

6 Q. Okay. Assuming that, other than that
7 postmortem redistribution, is there anything else that
8 you think he should have considered and didn't?

9 THE WITNESS: I'm sorry, was there an
10 objection?

11 MR. MORIARTY: I did not object to that
12 question.

13 THE WITNESS: I'm sorry, could you repeat
14 your question?

15 MR. ERNST: I'll have it re-read.

16 (The requested portion was read back.)

17 THE WITNESS: I don't recall
18 specifically, from his deposition, if he considered
19 Mr. McCornack's clinical presentation on the day of
20 his death or any symptoms he might have presented. I
21 don't recall specifically if he considered that, but
22 if he didn't, he should have.

23 BY MR. ERNST:

24 Q. So just generically, as a forensic
25 pathologist, you would consider postmortem blood

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1 testing, a clinical picture before his death, the
2 investigation before his death, medical records before
3 his death, and autopsy findings; true?

4 A. I think that's a good generic description,
5 yes.

6 Q. Okay. And Dr. Mason did all of those, didn't
7 he?

8 A. Again, I can't recall specifically from his
9 deposition if he had information about
10 Mr. McCornack's -- any signs and symptoms he may have
11 had on the day of his death.

12 Q. On page 3 of your report, you note that
13 there's a 3.6 nanogram per milliliter of digoxin, as
14 reported by NMS in postmortem blood, and you further
15 note it's not an accurate reflection of the antemortem
16 digoxin level in Mr. McCornack, and that the
17 antemortem level was lower than the postmortem level.
18 Do you see that?

19 A. It's on page 2, but, yes, I see it.

20 Q. It's on my page 3, but okay.

21 So, Doctor -- actually, I want you to go to
22 page 3, top paragraph, do you see that?

23 MR. MORIARTY: Yeah, the one she's
24 looking at, Don, was printed not on letterhead, so the
25 pagination is a little different. Do you want me to

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1 give her the exhibit version, which is printed on
2 letterhead?

3 MR. ERNST: I just want to make sure
4 we're on the same page, pun intended.

5 MR. MORIARTY: (Tenders document to
6 witness.)

7 Where do you want her to look, page 3?

8 MR. ERNST: It says a 3.6 nanograms per
9 milliliter of digoxin is reported by NMS, and
10 postmortem blood is not an accurate reflection of the
11 antemortem digoxin level --

12 THE COURT REPORTER: I'm sorry, you need
13 to slow down just a little bit, please.

14 BY MR. ERNST:

15 Q. All right. Therefore --

16 MR. ERNST: Do you have the sentence
17 there? It's the second sentence on page 3 of Exhibit
18 4.

19 THE COURT REPORTER: I don't have it, but
20 it's present on the table.

21 MR. ERNST: Who said that?

22 MR. MORIARTY: The court reporter is
23 telling you that she has it but is not reading it. So
24 she wanted you to just slow down if you're going to
25 read the sentence.

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1 MR. ERNST: Okay.

2 BY MR. ERNST:

3 Q. "Therefore," comma, the 3.6 nanograms per
4 milliliter "of digoxin as reported by NMS and
5 postmortem blood is not an accurate reflection of the
6 antemortem digoxin level in Mr. McCornack, and the
7 antemortem level was lower than the postmortem level,"
8 period. Do you see that, Doctor?

9 A. Yes, I do.

10 Q. Now, you will say that because of the
11 postmortem redistribution; true?

12 A. Yes.

13 Q. Now, based upon your -- or do you have an
14 opinion as to what the number was in Mr. McCornack
15 before he died, the level of digoxin?

16 MR. MORIARTY: Objection; form.

17 Go ahead.

18 THE WITNESS: With a general --

19 BY MR. ERNST:

20 Q. I will rephrase -- go ahead if you understand
21 my question.

22 A. No, sir, please rephrase it.

23 Q. Do you have an opinion as to what his blood
24 level was, of digoxin, before he died?

25 MR. MORIARTY: Objection; form.

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1 Go ahead.

2 THE WITNESS: With the understanding that
3 the principle of postmortem redistribution is that the
4 postmortem drug level goes up, not down, other than
5 that general caveat, no, you cannot scientifically
6 infer that -- any one particular number of his digoxin
7 level prior to his death.

8 BY MR. ERNST:

9 Q. Right. It could be a range, would you agree
10 with that?

11 A. I don't think I understand what you're asking
12 me.

13 Q. Well, what your testimony is is that the
14 pre-death level of digoxin in Mr. McCornack in the
15 hours before he died, in your opinion, was less than
16 3.6; true?

17 A. Yes.

18 Q. But it's your testimony that you can't give a
19 specific number as to what your opinion is about his
20 digoxin level in the hours before his death; true?

21 A. What I'm saying is that there's no
22 scientifically valid way to assign a specific number
23 to what his antemortem blood level was simply based
24 alone on the postmortem blood level.

25 Q. You're aware that the War/Paul (phonetic) uses

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1 ranges to compute pre-death levels of digoxin; true?

2 MR. MORIARTY: Objection.

3 THE WITNESS: I think I've made my answer
4 perfectly clear that it is impossible, with any
5 scientific validity -- that you cannot assign a
6 specific level of antemortem digoxin based on the
7 postmortem level alone.

8 BY MR. ERNST:

9 Q. And you're aware that that is contrary to your
10 sentence on page 2 of your report, where there's an
11 actual ratio that's discussed, antemortem/postmortem,
12 from femoral blood vein and for heart blood specimens
13 as reflected in the Baselt textbook?

14 MR. MORIARTY: Objection.

15 THE WITNESS: No, it's absolutely not
16 contradictory.

17 BY MR. ERNST:

18 Q. Now, are you aware that Actavis issued a
19 recall letter on its letterhead, Doctor?

20 A. I do not have a copy of that letter, no.

21 Q. Doctor, would you agree that digoxin toxicity
22 can cause cardiac instability?

23 A. Yes.

24 Q. Would you agree that digoxin toxicity can
25 cause bradycardia, or a slowing of the heart?

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1 A. Yes.

2 Q. Would you agree that digoxin toxicity can
3 cause ventricular arrhythmia?

4 MR. MORIARTY: Objection; form.

5 Go ahead.

6 THE WITNESS: Yes.

7 BY MR. ERNST:

8 Q. Would you agree that digoxin toxicity can
9 cause sudden cardiac death?

10 MR. MORIARTY: Objection; form.

11 Go ahead.

12 THE WITNESS: Yes.

13 BY MR. ERNST:

14 Q. Would you agree that digoxin toxicity can
15 sometimes cause nausea, cardiac instability, death,
16 low blood pressure, dizziness, and bradycardia?

17 MR. MORIARTY: Objection.

18 Go ahead.

19 THE WITNESS: Yes.

20 BY MR. ERNST:

21 Q. And some of those symptoms appear with digoxin
22 toxicity, and some of them don't; isn't that true?

23 MR. MORIARTY: Objection.

24 Go ahead.

25 THE WITNESS: Yes.

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1 BY MR. ERNST:

2 Q. So a person could have vomiting or dizziness
3 as a reflection of digoxin toxicity; true?

4 A. Yes.

5 Q. And a person could have a sudden cardiac death
6 as a result of digoxin toxicity?

7 MR. MORIARTY: Objection.

8 BY MR. ERNST:

9 Q. Without dizziness -- without dizziness; isn't
10 that true?

11 MR. MORIARTY: Objection.

12 Go ahead.

13 THE WITNESS: Yes, it's true.

14 BY MR. ERNST:

15 Q. And a person could have sudden cardiac death
16 without vomiting; isn't that true?

17 MR. MORIARTY: Objection.

18 Go ahead.

19 THE WITNESS: It's true, yes.

20 BY MR. ERNST:

21 Q. And it's true that a person could have sudden
22 cardiac death without any symptoms at all, except the
23 death itself, from digoxin toxicity; isn't that true?

24 MR. MORIARTY: Objection.

25 Go ahead.

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1 THE WITNESS: I think it's unlikely for a
2 patient -- very unlikely for a patient to die from
3 acute digoxin toxicity without exhibiting any symptoms
4 whatsoever.

5 BY MR. ERNST:

6 Q. Is fatigue a symptom of digoxin toxicity?

7 A. It's a very nonspecific generic that may be
8 associated with digoxin toxicity.

9 Q. And, Doctor, would you agree that digoxin has
10 a narrow therapeutic range?

11 A. Well, as I've previously testified to in the
12 previous line of questioning, that it's described that
13 way, yes, in the literature; however, that the
14 specific level, in any one particular patient, is
15 based on the clinical response and their symptoms, not
16 necessarily to a number alone.

17 Q. Doctor, in all the times you've ever testified
18 in criminal cases, have you ever rendered an opinion
19 about a cause of death due to a drug overdose without
20 having actually done the autopsy itself?

21 A. Yes.

22 Q. And did you do a review of records when you
23 rendered that opinion?

24 A. I did a review of records, I did a review of
25 the autopsy report, of the autopsy photographs, of the

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1 toxicology, and the medical history.

2 Q. In this particular case, did you ever review
3 the photographs of the autopsy of Mr. McCornack?

4 MR. MORIARTY: Objection.

5 THE WITNESS: I did not.

6 BY MR. ERNST:

7 Q. Now, Doctor, I have faxed back to the court
8 reporter a document that I would like marked -- I
9 believe next in order -- is it Exhibit 7?

10 THE COURT REPORTER: Yes. We'll have to
11 obtain that. It's probably arrived, but we don't have
12 it in our room.

13 MR. MORIARTY: I'll be right back.

14 MR. ERNST: It has been faxed, so if we
15 could --

16 THE WITNESS: Mr. Moriarty has stepped
17 out of the room, so if we could just wait for a
18 second. He went to get the fax.

19 MR. ERNST: Sure.

20 (Brief recess was observed.)

21 MR. MORIARTY: There's a three-page
22 document here.

23 MR. ERNST: Okay, let's mark it as
24 Exhibit 7.

25 (Marked Exhibit No. 7.)

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1 BY MR. ERNST:

2 Q. Doctor, do you have an understanding of why
3 Actavis recalled Digitek® tablets?

4 A. I do.

5 Q. What is that understanding?

6 A. My understanding is that there was a
7 possibility that there may have been some what --
8 terminology used is "double-thick tablets" that were
9 produced.

10 Q. Well, when you rendered your opinions in 2009
11 and you wrote your report, did you know that
12 Mr. McCornack had been sent a specific recall notice
13 with a lot of medication that he was taking and did
14 not receive it until after his death?

15 MR. MORIARTY: Objection.

16 Go ahead.

17 THE WITNESS: I don't know that I
18 specifically recall that it was received after his
19 death for that specific lot number.

20 BY MR. ERNST:

21 Q. Would that have been an important factor for
22 you to know?

23 A. It's a fact I would have considered; however,
24 based on the information I've been provided, it would
25 not have changed the cause of death.

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1 Q. Now, let's look at the Actavis letter marked
2 as Exhibit 7.

3 By the way, you've been retained by
4 Mr. Moriarty, but do you know who Mr. Moriarty
5 represents?

6 A. Yes, I do.

7 Q. And who is that?

8 A. He represents Actavis Totowa, L.L.C.,
9 manufacturer of Digitek».

10 Q. Right. Okay, so what's Exhibit 7?

11 A. Exhibit 7 is an "Urgent: Drug Recall" from
12 Actavis for "Digitek (digoxin tablets USP)."

13 Q. And you've been asked to testify that
14 Mr. Moriarty [sic] didn't die of digoxin toxicity;
15 right?

16 MR. MORIARTY: Thank God I didn't die of
17 digoxin toxicity.

18 BY MR. ERNST:

19 Q. I'm sorry --

20 MR. MORIARTY: Can you rephrase that?

21 BY MR. ERNST:

22 Q. -- you've been asked to testify that
23 Mr. McCornack didn't die of digoxin toxicity; right?

24 MR. MORIARTY: Thank you for rephrasing
25 that.

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1 BY MR. ERNST:

2 Q. I appreciate the --

3 A. No, I was not asked to provide that testimony.

4 I was asked to provide my expert opinion as to why

5 Mr. McCornack died.

6 Q. Right. But here you have a recall --

7 Exhibit 7 is a recall notice from Actavis itself;

8 right?

9 A. Yes, it is a drug recall from Actavis.

10 Q. And have you ever seen this document before?

11 A. I have not. I've seen two other recall

12 statements but not this particular one.

13 Q. The two other recall statements that you have,
14 do they have Actavis's name on them?

15 A. Yes.

16 Q. Now, this Actavis "Urgent: Drug Recall"
17 document, let's go through it. What's the first
18 sentence state, for the record?

19 A. "Dear Valued Customer."

20 Q. Go down to the first full paragraph that
21 starts, "This recall," do you see that?

22 A. Yes.

23 Q. Read that sentence for us, please.

24 A. "This recall has been initiated due to
25 overweight tablets.

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1 Q. And the second sentence?

2 A. "Potential risk to the patient depend on the
3 constituency of the tablets."

4 Q. And the next sentence?

5 A. "Depending on the constituency of the tablets,
6 double the dose is taken, it can be expected that
7 digitalis toxicity can occur in individuals taking
8 daily doses or in patients with renal insufficiency."

9 Q. Do you agree with that statement, Doctor?

10 A. Yes.

11 Q. Read the next sentence.

12 A. "Toxicity can cause nausea, vomiting,
13 dizziness, low blood pressure, cardiac instability,
14 and bradycardia."

15 Q. Do you agree with that statement?

16 A. Yes.

17 Q. Then the next sentence, it says, "Death can
18 result from excessive digitalis intake." Do you see
19 that?

20 A. I do see it.

21 Q. Do you agree with that?

22 A. Yes.

23 Q. Is there anything in this paragraph that talks
24 about anything other than overweight tablets?

25 A. I'm sorry?

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1 Q. Is there anything in this paragraph that talks
2 about double-thick tablets?

3 A. "Overweight tablets," it says, but not
4 specifically double thickness.

5 Q. Have you ever been informed that the recall
6 was for overweight tablets?

7 MR. MORIARTY: Objection.

8 Go ahead.

9 MS. AHERN: Objection.

10 THE WITNESS: No. The terminology that's
11 used in the FDA recall is "double the appropriate
12 thickness may have been commercially released."

13 BY MR. ERNST:

14 Q. Right. Now, let's go to that paragraph in
15 Exhibit 7 again. And the last sentence is: "If the
16 increased thickness is due to clinically inert
17 substances, then a decreased amount of digitalis may
18 be absorbed." Do you see that?

19 A. I do see it.

20 Q. Did you factor that into your opinion?

21 A. Of course.

22 Q. Do you have an opinion that, perhaps,
23 Mr. McCornack didn't get enough Digitek® in his system
24 that caused his death?

25 MR. MORIARTY: Objection.

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1 Go ahead.

2 THE WITNESS: There's no evidence to
3 support that, no.

4 BY MR. ERNST:

5 Q. Do you have any evidence to dispute that?

6 MR. MORIARTY: Objection.

7 Go ahead.

8 THE WITNESS: No, but there's no evidence
9 to support it.

10 BY MR. ERNST:

11 Q. It's true, isn't it, that digoxin toxicity can
12 lead to sudden cardiac death? True?

13 A. Yes, you've asked me that several times now,
14 and I've answered it.

15 Q. And it's also true that a lack of digoxin in
16 the system can lead to sudden cardiac death, if a
17 person doesn't take enough digoxin; isn't that true?

18 MR. MORIARTY: Objection.

19 Go ahead.

20 THE WITNESS: It's true that if one does
21 not get the appropriate amount of a particular drug,
22 it may exacerbate their underlying cardiac disease,
23 correct.

24 BY MR. ERNST:

25 Q. Exhibit 7 contains some information about the

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1 recall, doesn't it?

2 A. Yes, it does.

3 Q. And don't you think that that would be an
4 important factor for you to have considered in
5 rendering the opinions that you've rendered here
6 today?

7 MR. MORIARTY: Objection.

8 Go ahead.

9 THE WITNESS: Again, and as I've
10 previously testified to, any information I'm willing
11 to consider in determining the cause of death.

12 BY MR. ERNST:

13 Q. Now, you have testified in courts of law in
14 criminal cases about drug overdoses or drug toxicity
15 causing death; true?

16 A. Yes, sir, I have.

17 Q. And people have been convicted based upon your
18 testimony; true?

19 MR. MORIARTY: Objection.

20 Go ahead.

21 THE WITNESS: I wouldn't quite
22 characterize it that they were convicted based on my
23 testimony. Again, I provide an independent medical
24 opinion as to the cause of death and manner of death,
25 and what's done in the judiciary after that is

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1 certainly beyond my control.

2 BY MR. ERNST:

3 Q. Does postmortem redistribution occur with all
4 drugs?

5 A. To some degree, yes, but certainly more so in
6 some than others.

7 Q. And are you aware of literature out there that
8 says that you can't ever reliably testify to what a
9 pre-death drug level is based on a postmortem test?

10 A. I think that the literature says that to try
11 to come up with a specific antemortem level based on
12 the postmortem level is fraught with error and not
13 scientifically valid.

14 Q. But you've testified as [sic] the cause of
15 death on multiple occasions in criminal cases when
16 people have been convicted; isn't that true?

17 MR. MORIARTY: Objection; you've asked
18 that six times.

19 Go ahead, tell him again.

20 THE WITNESS: Yes, that's correct.

21 BY MR. ERNST:

22 Q. So, Doctor, there is a reason that people
23 do -- forensic pathologists such as yourself order a
24 postmortem test for digoxin, isn't it [sic]?

25 A. Yes.

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1 Q. There's a reason you do the test; right?

2 A. Yes.

3 Q. And it's important to know, postmortem, what
4 the level of digoxin is in a person who has died of a
5 cardiac event; isn't that true?

6 MS. AHERN: Objection.

7 MR. MORIARTY: Objection.

8 Go ahead.

9 THE WITNESS: Yes, I would agree.

10 BY MR. ERNST:

11 Q. And it's important to know because it's a
12 factor that you would consider in a cause of death;
13 isn't that true?

14 A. Yes. And in this particular case, it was not
15 a factor in Mr. McCornack's death.

16 MR. ERNST: Objection; reserve a motion
17 to strike. It's an added argumentative factor by the
18 witness.

19 BY MR. ERNST:

20 Q. Doctor, would you acknowledge that you have a
21 different opinion as to the cause of death than does
22 Dr. Mason?

23 A. Yes.

24 Q. And would you acknowledge that Dr. Mason
25 actually performed the autopsy on Mr. McCornack, and

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1 you did not?

2 A. Well, of course.

3 Q. And would you acknowledge that it is the job
4 and duty of Dr. Mason, as the forensic pathology
5 examiner in Sante Cruz, to determine the cause of
6 death?

7 A. Yes.

8 MR. ERNST: I would like to review my
9 notes. I think I'm just about done.

10 MR. MORIARTY: Okay. We'll take three,
11 four, five minutes?

12 MR. ERNST: Yeah, three, four, five,
13 that's all.

14 (Brief recess was observed.)

15 BY MR. ERNST:

16 Q. Doctor, you have listed a number of articles
17 in the book, but in your report you didn't mention any
18 articles. Did you go to these articles after you did
19 your report, or you just left them out of the report
20 that you wrote, Exhibit 4?

21 A. I'm sorry, when you refer to the "book," what
22 are you referring to?

23 Q. Your black book there that you -- you know,
24 you have a bunch of articles, research articles that
25 you looked up; right?

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1 A. Right.

2 Q. Like the Baselt article and the other
3 articles?

4 A. Uh-huh.

5 Q. You don't mention those in your report. Did
6 you look at those articles before you wrote your
7 report or after?

8 MR. MORIARTY: Objection.

9 Go ahead.

10 THE WITNESS: Well, there is another
11 article that's listed in here, the Journal from
12 British Pharmacology -- or "British Journal of
13 Pharmacology," I should say, so, yes, that was
14 included in here. The other two were just for
15 information. But, no, I looked them up prior to my
16 report.

17 BY MR. ERNST:

18 Q. Did Mr. Moriarty already give you any
19 articles?

20 A. No.

21 Q. Now, you talked to Mr. Moriarty before your
22 deposition today; true?

23 A. Yes, I did.

24 Q. For how long?

25 A. We started our meeting this morning at

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1 approximately 7:45 and ended it at approximately 9:00.

2 Q. Did you discuss specific questions and answers
3 that I would go over -- that I was expected to ask?

4 MR. MORIARTY: Objection.

5 Go ahead, you can answer that.

6 THE WITNESS: Yes. He covered areas that
7 may have been potential lines of questioning, yes.

8 BY MR. ERNST:

9 Q. You also rendered an opinion about Mr. Keith
10 Gibson in your report. Do you see that?

11 A. Point me specifically to where it is in the
12 report.

13 Q. Well, do you have an opinion about Mr. Keith
14 Gibson's report?

15 MR. MORIARTY: Objection; form.

16 THE WITNESS: Yes, sir, I see it. Yes,
17 it said I "disagree with and find no medical basis for
18 the final opinions as expressed by Keith Patrick
19 Gibson, Pharm.D, J.D."

20 BY MR. ERNST:

21 Q. Do you know how many footnotes were to
22 Mr. Gibson's report?

23 A. No.

24 Q. Did you read all the referenced materials that
25 Mr. Gibson mentioned in his report?

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1 A. Not all of it, no.

2 Q. Well, how many did you read of Mr. Gibson's
3 footnoted literature that he reviewed?

4 A. I don't remember.

5 Q. Less than five?

6 A. I don't remember.

7 Q. Do you recall reading when Ms. McCornack found
8 Mr. McCornack nonresponsive the night of his death?

9 A. I recall reading a description of that from a
10 coroner's report, yes.

11 Q. And he was turning blue?

12 A. Yes, I remember that.

13 Q. And he couldn't breathe?

14 A. Yes.

15 Q. That is consistent with digoxin toxicity,
16 isn't it?

17 MR. MORIARTY: Objection; form.

18 Go ahead.

19 MS. AHERN: Objection.

20 THE WITNESS: No, it's not.

21 BY MR. ERNST:

22 Q. Is it consistent with sudden cardiac death?

23 A. It's consistent with someone having some type
24 of terminal event, but you cannot make any type of
25 diagnosis to the etiology of the event without more

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1 information.

2 Q. Would you agree that turning blue and being
3 unable to breathe is consistent with a terminal
4 cardiac event, also known as sudden cardiac death?

5 MR. MORIARTY: Objection; form.

6 Go ahead.

7 THE WITNESS: I think it is certainly one
8 possibility in a long list of diagnoses that could
9 cause someone to turn blue and have difficulty
10 breathing.

11 BY MR. ERNST:

12 Q. Are you a pharmacist?

13 A. Of course not.

14 Q. Are you a toxicologist?

15 A. Of course not.

16 Q. I take it that you're not rendering an opinion
17 about Mr. Gibson's toxicological opinion, are you?

18 MR. MORIARTY: Objection.

19 THE WITNESS: I'm rendering an opinion
20 that I disagree with his final statement.

21 BY MR. ERNST:

22 Q. And that's the cause of death?

23 A. Correct.

24 Q. Is that the only thing you disagree with?

25 A. No. I also disagree with the fact that

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1 Mr. Gibson states the elevated digoxin level was
2 probably the result of a change in formulation of the
3 Digitek® tablet or a nonconforming tablet.

4 Q. But you've already testified that you're not a
5 pharmacist or a toxicologist; true?

6 A. Right.

7 Q. Wouldn't that be in the realm of toxicology
8 and pharmacology?

9 MR. MORIARTY: Objection.

10 MS. AHERN: Objection.

11 THE WITNESS: I think it's in the realm
12 of a statement that has no valid basis for it. I
13 think it's a [sic] realm of a speculative statement at
14 best.

15 BY MR. ERNST:

16 Q. Wouldn't you agree that --

17 MR. MORIARTY: Can I just interject? If
18 this --

19 MR. ERNST: No.

20 MR. MORIARTY: -- if this --

21 MR. ERNST: No, if you --

22 MR. MORIARTY: -- if this case --

23 MR. ERNST: If you have an objection --
24 if you have an objection, you can place it on the
25 record.

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1 MR. MORIARTY: I'm trying to help you.

2 You refuse to be helped.

3 MR. ERNST: You know what, Matthew, I
4 really appreciate the fact that you'd like to help me,
5 but, frankly . . .

6 MR. MORIARTY: Fine, go ahead, ask your
7 question.

8 BY MR. ERNST:

9 Q. Looking at Exhibit 7, are you aware of where
10 all of the recalled Digitek® went, Doctor?

11 A. No, I'm not.

12 Q. Looking at Exhibit 7, do you see that it was
13 sent to Stericycle?

14 A. I see that now, yes.

15 Q. Has Mr. Moriarty or anyone from Actavis given
16 you any information about testing done at Stericycle
17 on all of the recalled drugs --

18 MR. MORIARTY: Objection.

19 BY MR. ERNST:

20 Q. -- of the Digitek®?

21 MR. MORIARTY: Objection. There was no
22 testing done at Stericycle.

23 BY MR. ERNST:

24 Q. Were you aware there was no testing done at
25 Stericycle, Doctor?

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1 A. Well, if this Stericycle is the same as the
2 Stericycle that's here in Tennessee, they don't do any
3 testing, that I know of. It's a hazardous waste
4 removal service.

5 Q. Right. Were you aware if any testing was done
6 of all the recall drugs at Stericycle by Actavis?

7 MR. MORIARTY: Objection.

8 THE WITNESS: No, I'm not aware of any
9 other testing that was done.

10 BY MR. ERNST:

11 Q. Thank you, Doctor.

12 Would it have been important to you to know if
13 any testing was done with all of these recalled drugs?
14 Wouldn't it be a factor for you to think about and
15 consider?

16 A. No, it would not have any bearing on the cause
17 of death of Mr. McCornack.

18 Q. Even though Mr. McCornack's drugs were in the
19 recalled batch, you don't think it would have been
20 important to know about that?

21 A. No, because I was already aware of that.

22 Q. All right, Doctor, thank you very much. I
23 don't have any further questions.

24 MR. MORIARTY: I have, maybe, three.

25 CROSS-EXAMINATION

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1 BY MR. MORIARTY:

2 Q. Did you have toxicology training in med
3 school, your residency, and your fellowship?

4 A. Yes.

5 Q. When you've testified in criminal cases, is
6 one of the issues the mere presence of the drug in
7 someone's system?

8 MR. ERNST: Objection.

9 THE WITNESS: Yes. One of the factors is
10 just a mere presence.

11 BY MR. MORIARTY:

12 Q. Give me an example.

13 MR. ERNST: Objection.

14 BY MR. MORIARTY:

15 Q. Go ahead.

16 A. For example, the most recent criminal case
17 that I testified in was a young child, below the age
18 of two, who had oxycodone and Alprazolam in her
19 system. So obviously, irrespective of levels, just
20 the presence of those drugs in a small child in which
21 they were not prescribed is important.

22 Q. In your career as a forensic pathologist, have
23 you ever used a postmortem blood level of a drug to
24 back calculate to an antemortem level of that drug?

25 A. No.

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1 MR. ERNST: Objection.

2 MR. MORIARTY: I'm done. Thank you.

3 REDIRECT EXAMINATION

4 BY MR. ERNST:

5 Q. Doctor, isn't it true that you've used a
6 postmortem level of a drug to determine a range of
7 antemortem blood levels?

8 A. No, I do not give a range. I take a
9 postmortem drug level in consideration of the
10 postmortem redistribution to determine whether or not
11 that drug was a factor in someone's death.

12 Q. So it's very important for you to look at the
13 postmortem level, factor in what the redistribution
14 status is of that particular drug, and then render an
15 opinion, and you have done so in courts of law; true?

16 A. Yes.

17 Q. Thank you very much. I don't have any other
18 questions.

19 MR. MORIARTY: Hunter, do you have any
20 questions?

21 MS. AHERN: I do not.

22 Thank you, Doctor.

23 MR. MORIARTY: Thank you. She will read
24 and sign. Thank you.

25 MR. ERNST: Thank you.

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1 THE COURT REPORTER: Mr. Ernst, would you
2 like to order a copy today?

3 MR. ERNST: Yes, I would. And I need
4 it -- how soon can you have an electronic copy of the
5 deposition?

6 (Discussion off the record.)

7 MR. ERNST: Tuesday would be okay.

8 THE COURT REPORTER: And would you like a
9 copy of the exhibits?

10 MR. ERNST: Yes. Those can come via hard
11 copy. I'm really interested in the deposition
12 transcript. And if you could give me a rough.

13 Doctor, thank you very much for coming.

14 THE WITNESS: You're welcome. Thank you.

15 (Proceedings adjourned at 12:30 p.m.)

16 FURTHER DEPONENT SAITH NOT.

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1 REPORTER'S CERTIFICATE

2 I certify that the witness in the foregoing
3 deposition AMY R. McMASTER, M.D., was by me duly sworn
4 to testify in the within-entitled cause; that the said
5 deposition was taken at the time and place therein
6 named; that the testimony of said witness was reported
7 by me, a Shorthand Reporter and Notary Public of the
8 State of Tennessee authorized to administer oaths and
9 affirmations, and said testimony, pages 6 through 98
10 was thereafter transcribed into typewriting.

11 I further certify that I am not counsel or
12 attorney for either or any of the parties to said
13 deposition, nor in any way interested in the outcome
14 of the cause named in said deposition.

15 IN WITNESS WHEREOF, I have hereunto set
16 my hand the 9th day of August, 2011.

17

18

19

20

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22

23

24

Deborah M. Fernald, TLCR No. 306
My commission expires: 07/06/2015

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1

E R R A T A

2 I, AMY R. McMASTER, M.D., having read the
foregoing deposition, pages 6 through 98, taken
3 August 4, 2011, do hereby certify said testimony is a
true and accurate transcript, with the following
4 changes, if any:

5 PAGE LINE SHOULD HAVE BEEN

6 _____

7 _____

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AMY R. McMASTER, M.D.

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19 _____
Notary Public

My commission expires: _____

20 _____

21 _____

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25 _____

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